(13)

No. 95-8736

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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LARRY OSA OGBOMON,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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*Amicus Curiae, invited by the Court per Order of October 7, 1996*

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## QUESTION PRESENTED

Whether 18 U.S.C. § 3583(d) authorizes a district court, when sentencing an alien defendant who is subject to deportation, to require that the defendant be deported.

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LARRY OSA OGBOMON,
*Petitioner*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

### STATEMENT

Following a plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of reentering the United States after having been deported, in violation of 8 U.S.C. § 1326. The district court sentenced him to 16 months' imprisonment, to be followed by a three-year period of supervised release. Pursuant to 18 U.S.C. § 3583(d), the district court ordered that petitioner be deported as a condition of his supervised release. J.A. 9, 12. The court of appeals affirmed. J.A. 15-16.

**A. Prior Proceedings**

Petitioner, a Nigerian national, was convicted in 1991 of numerous felony offenses involving fraud and forgery.

Presentence Report (PSR) ¶ 4. Later that year, he pleaded guilty in federal court to two counts of bank fraud. He was sentenced to imprisonment, to be followed by a term of supervised release with the special condition that he depart from the United States. PSR ¶ 5. Petitioner was released from prison to the Immigration and Naturalization Service (INS) and, on November 20, 1991, he was deported from the United States. PSR ¶ 6.

**B. Proceedings In The District Court**

On October 21, 1993, petitioner was found in the United States. J.A. 2; PSR ¶ 8. He was indicted for violating 8 U.S.C. § 1326, which prohibits deported aliens from unlawfully reentering the United States. The indictment alleged that petitioner was "an alien who had been previously arrested and deported from the United States pursuant to law, and who . . . had not received the consent of the Attorney General of the United States to reapply for admission to the United States." J.A. 2. Petitioner ultimately entered a plea of guilty to the indictment. J.A. 1, 10, 15.

In petitioner's presentence report, the probation officer recommended the following condition of supervised release:

> Upon completion of the imprisonment portion of the sentence, the defendant shall be deported from the United States pursuant to 18 U.S.C. 3583(d). [He] shall be delivered to a duly authorized Immigration official for such deportation and shall be detained in the custody of the Immigration and Naturalization Service until deported from the United States.

PSR 10 (Worksheet D). Petitioner did not object to this portion of the presentence report. PSR 12.

At the sentencing hearing, counsel for petitioner reiterated that "we don't have any objections" to the presentence report. J.A. 4. The district court accordingly informed petitioner:



> [O]n completion of the imprisonment portion of your sentence, you shall be deported from the United States pursuant to 18 United States Code, Section 3583(d). You shall take no action to resist an order of deportation. You shall not return to the United States during the period of supervised release. You shall be detained in the custody of the Immigration and Naturalization Service pending your deportation from the United States.

J.A. 9. Counsel for petitioner then "object[ed] to the court's imposition of deportation." *Ibid.*

The judgment entered by the district court committed petitioner to the custody of the Bureau of Prisons for 16 months, to be followed by three years of supervised release. J.A. 11-12. The judgment provided that, as a condition of his supervised release, petitioner "shall depart the United States when ordered to do so by the Immigration and Naturalization Service." J.A. 12. The court further ordered that petitioner "shall take no action to appeal or resist any order [of] deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release." *Ibid.*[1]

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[1] In contrast to the district court's statement on the record at the sentencing hearing, the court's judgment does not expressly order that petitioner be deported. Instead, the judgment can plausibly be read to leave that decision to the INS. Moreover, the INS apparently did not consider itself to be bound by any judicial order of deportation with respect to petitioner. Instead, the INS initiated its own administrative proceedings against petitioner and ultimately ordered his deportation. *See* U.S. Br. 6 & n.4. Accordingly, it could be argued that the question set forth in the petition for a writ of certiorari is not in fact presented on the record in this case. The appeal in this case was litigated on the assumption that the district court did order petitioner's deportation, however, and the court of appeals accepted that assumption. J.A. 15. As a result, it would be appropriate for this Court to resolve the case on that basis. If, however, the Court were to conclude that the district court did not actually order petitioner's deportation, the writ of certiorari should be dismissed as improvidently granted.

**C. Proceedings In The Court Of Appeals**

Petitioner appealed, arguing "that the district court lacked authority to order his deportation without affording him recourse to the procedures under the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*" J.A. 15-16.[2] The court of appeals affirmed, relying on *United States* v. *Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994). In *Chukwura*, the court had held that "[t]he language [of 18 U.S.C. § 3583(d)] is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *Id.* at 1423; *see* J.A. 16 (*Chukwura* "held that the district court could order deportation as a condition of supervised release without recourse [to] the procedures for an administrative hearing and judicial review under the INA").[3]

[2] Although petitioner also "argue[d] that the district court erred in failing to make findings of fact regarding his deportability, and failing to consider the possibility of suspension of deportation," the court of appeals declined to consider those arguments because they had not been presented to the district court. J.A. 16 n.1.

[3] In *Chukwura*, the United States argued before the Eleventh Circuit that the district court

> had clear statutory authority under 18 U.S.C. § 3583(d) to order the defendant deported and to serve the period of supervised release outside of the country. The fact that the Immigration and Naturalization Service had jurisdiction to regulate the expulsion of aliens does not preclude the court from exercising its statutory authority to order the deportation as a term of supervised release.

Brief for Appellee in *United States* v. *Chukwura*, No. 92-8737, at 6. After the court of appeals agreed with the Government's submission, the defendant petitioned for a writ of certiorari. The Solicitor General reexamined the position of the United States and concluded that Section 3583(d) should not be read to authorize district courts to order the deportation of alien defendants. Brief for the United States in *Chukwura* v. *United States*, No. 93-8962 (U.S. *Chukwura* Br.), at 9. In petitioner's case, the Government informed the court of appeals of its change in position, but the panel concluded that it



**D. Subsequent Proceedings**

After petitioner's release from prison he was arrested pursuant to a warrant of deportation, although he was not deported. U.S. Br. 6 & n.4. Petitioner was subsequently arrested in the Northern District of Alabama and indicted "on a variety of federal charges." U.S. Br. 7 n.5. He pleaded guilty to all counts and was sentenced to 24 months of imprisonment, to be followed by five years of supervised release. *Ibid.* The sentencing court ordered, as a condition of petitioner's supervised release, that he " 'shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 U.S.C. 3583(d) and with [*Chukwura*].' " *Ibid.* (quoting *United States* v. *Ogbomon*, No. CR 96-PT-124-NE (N.D. Ala. Aug. 29, 1996), at 3)).[4]

was bound by the prior decision in *Chukwura* and the full court declined to rehear the case en banc. J.A. 16, 17-18.

[4] As a result of petitioner's arrest in Alabama, the Georgia district court entered an order revoking petitioner's supervised release and requiring him to serve 12 months in prison. U.S. Br. 6. As the Government notes, this order raises a question of mootness. *Ibid.* Although petitioner is not subject to any further term of supervised release for his Georgia conviction (*see* 18 U.S.C. § 3583(h)), the subsequent order of deportation in the Alabama action may demonstrate that "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again" and, therefore, that the sentencing term of which petitioner complains is "capable of repetition, yet evading review." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). In the alternative, the Court presumably could avoid any question of mootness by granting either or both of the pending petitions in *Oboh* v. *United States*, No. 96-6653, and *Bowen* v. *United States*, No. 96-6658, which present the same issue as this case, and consolidating them with the instant petition. *Cf. Rogers* v. *Paul*, 382 U.S. 198, 199 (1965) (per curiam) (adding petitioners to avoid the possibility of mootness). If the Court ultimately concludes that this case is moot, the petition for a writ of certiorari should be dismissed. This would not be an appropriate case for vacatur of the judgment below pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950),

Meanwhile, petitioner sought review in this Court of the decision affirming his Alabama sentence, arguing that the court of appeals' reliance on *Chukwura* reflected a conflict among the Circuits on the proper interpretation of 18 U.S.C. § 3583(d). While the petition was pending, the en banc Eleventh Circuit "interpret[ed] section 3583(d) in accordance with its plain language and reaffirm[ed] *Chukwura*'s holding that section 3583(d) authorizes district courts to deport defendants 'subject to deportation' as a condition of supervised release." *United States* v. *Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996) (en banc) (*Oboh II*), *cert. pending*, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996). The *Oboh II* court acknowledged that its holding conflicted with decisions of other courts interpreting 18 U.S.C. § 3583(d). *See id.* at 1083 (citing conflicting decisions in *United States* v. *Xiang*, 77 F.3d 771 (4th Cir. 1996), *United States* v. *Quaye*, 57 F.3d 447 (5th Cir. 1995), and *United States* v. *Sanchez*, 923 F.2d 236 (1st Cir. 1991)).

## SUMMARY OF ARGUMENT

A. The last sentence of 18 U.S.C. § 3583(d) authorizes federal district courts, when sentencing an alien defendant who is subject to deportation, to "provide, as a condition of supervised release, that he be deported." As the court of appeals correctly concluded, this language unambiguously grants district courts the power to require the deportation of an alien defendant who is sentenced to a term of supervised release.

1. Contrary to the arguments of petitioner and the Solicitor General, Congress's use of the verb "provide" rather than "order" in the last sentence of Section 3583(d)

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because any mootness is attributable to petitioner's own actions. *See U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390-393 (1994). Petitioner's misconduct in committing additional crimes while on supervised release disentitles him to the equitable remedy of vacatur. *Id.* at 391-392.



does not detract from the district court's authority to require deportation. Petitioner and the Solicitor General rely on a grammatically inapposite definition of the word "provide," and they ignore the fact that the statute governing the conditions of probation—which is incorporated by reference in Section 3583(d)—uses "provide" to mean "order" or "require." The power to "provide . . . that [an alien defendant] be deported" is unquestionably the power to require the defendant's deportation.

2. Section 3583(d) requires district courts to look to the substantive standards set forth in the Immigration and Nationality Act (INA) in determining whether a particular defendant is an "alien" who is "subject to deportation." Section 3583(d) does not, however, incorporate by reference the various administrative procedures and avenues of relief applicable in INS proceedings. Petitioner's argument that only the INS can determine whether an alien is "subject to deportation" is incorrect under any reading of the statute, because Section 3583(d) expressly requires that determination to be made as a threshold matter by the district court before the court decides whether to exercise its discretion regarding deportation as a condition of supervised release.

3. The court of appeals' construction of Section 3583(d) is entirely consistent with the INA. Title 8 U.S.C. § 1103(a) grants the Attorney General authority over immigration matters generally. Under traditional rules of statutory construction, however, that general provision does not override Section 3583(d)'s specific grant of deportation authority to the district courts. And while 8 U.S.C. § 1252(b) establishes the "sole and exclusive procedure for determining the deportability of an alien *under this section*" (emphasis added), it does not purport to affect the separate authority of district courts under Section 3583(d).

4. Petitioner and the Solicitor General contend that the last sentence of Section 3583(d) merely authorizes

sentencing courts to order the surrender of alien defendants to the INS in order to facilitate a potential INS order of deportation. That interpretation should be rejected, however, because it would render the relevant statutory text without operative effect. Indeed, Congress provided in a separate provision (8 U.S.C. § 1252(h)) that supervised release would not stand as an obstacle to administrative deportation of aliens, and nothing in federal sentencing law would hinder the administrative deportation of defendants on supervised release even if the last sentence of Section 3583(d) had never been enacted.

B. The non-textual arguments advanced by petitioner and the Solicitor General in opposition to the plain-language interpretation of Section 3583(d) are unavailing.

1. The court of appeals' construction of Section 3583(d) is consistent with the history of congressional legislation in the immigration area. Congress has previously granted the federal courts a significant role in making deportation determinations. In the latter part of the 19th century and well into this century, for example, congressional legislation expressly vested in the federal courts the authority to determine whether certain aliens would be deported. For most of this century, moreover, federal sentencing courts possessed the power to issue a judicial recommendation against deportation that precluded the INS from using a particular conviction as a basis for deportation. Thus, there is nothing anomalous about construing Section 3583(d) in accordance with its plain language to grant limited deportation authority to federal sentencing courts.

2. The procedural protections applicable to sentencing proceedings (including determinations under Section 3583(d)) are not significantly different from those available in INS deportation hearings. Petitioner is therefore incorrect in arguing that Congress's failure to incorporate



specific procedures into Section 3583(d) reveals a legislative purpose not to grant deportation authority to sentencing courts.

3. There is no merit to petitioner's and the Solicitor General's reliance on former 18 U.S.C. § 4212 (1976), which they describe as a predecessor to Section 3583(d). That prior statute, which authorized parole boards to release defendants to the INS for administrative deportation, was enacted in order to override preexisting restrictions on the parole board's ability to release parolees who would not be remaining within the jurisdiction of the sentencing court. No such restrictions apply to a district court's authority to impose supervised release, so a statute analogous to 18 U.S.C. § 4212 was unnecessary once Congress abolished parole. Moreover, the textual differences between former 18 U.S.C. § 4212 and Section 3583(d) provide further confirmation that the latter statute (unlike the former) is a grant of deportation authority.

4. The various amendments to the immigration laws enacted after the adoption of Section 3583(d) do not undermine the court of appeals' plain-language interpretation of that provision. The addition of a judicial deportation provision to the INA in 1994 is entirely consistent with Section 3583(d). Section 3583(d) is purely a sentencing provision vesting discretionary authority in the federal courts; the 1994 amendment, by contrast, grants discretion to the Executive to determine whether to seek judicial deportation, and thereby provides the Attorney General with an efficient alternative to the commencement of administrative deportation proceedings against criminal aliens. Likewise, there is no conflict between Section 3583(d) and Congress's recent decision to authorize federal courts to impose deportation as a condition of probation in certain circumstances; probation and supervised release are mutually exclusive sentences.

More fundamentally, petitioner and the Solicitor General err in relying on legislation that post-dates the enactment of Section 3583(d). As this Court has repeatedly recognized, such *post hoc* legislative "history" is a highly dubious basis for construing a previously adopted statute.

## ARGUMENT

### TITLE 18 U.S.C. § 3583(d) AUTHORIZES DISTRICT COURTS TO REQUIRE THE DEPORTATION OF ALIEN DEFENDANTS AS A CONDITION OF SUPERVISED RELEASE

The district court relied on 18 U.S.C. § 3583(d) as authority for requiring that petitioner be deported as a condition of his supervised release. J.A. 9.[6] That statute reads, in relevant part:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d). This language is clear and unambiguous. It allows a district court, when sentencing an alien defendant who is subject to deportation, to require that he be deported and to order him delivered to the INS for such deportation. The contrary arguments advanced by petitioner, his *amici*, and the Solicitor General cast no doubt on the plain meaning of Section 3583(d).

[6] This case involves the interplay between Section 3583(d) and the immigration laws, which Congress has amended repeatedly in recent years. *See* U.S. Br. 2 n.1. Unless otherwise noted, this brief will refer to the statutes in effect when the district court entered judgment (United States Code, 1988 ed. & Supp. V) and will use the terminology that governed the proceedings below.



#### A. The Plain Language Of Section 3583(d) Allows District Courts To Require That Alien Defendants Be Deported

In the Sentencing Reform Act of 1984, Congress abolished parole and established a new form of post-imprisonment supervision known as supervised release. Pub. L. No. 98-473, tit. II, ch. II, §§ 212(a)(2), 218(a)(5), 235, 98 Stat. 1987, 1999, 2027, 2031; *see* 18 U.S.C. § 3583(a). "Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court." U.S.S.G. Ch. 7, Pt. A, intro. comment. District courts may impose a variety of conditions on the defendant in connection with a term of supervised release. 18 U.S.C. § 3583(d); *see* U.S.S.G. § 5B1.4 (policy statement) (listing standard conditions of supervised release).

Some of the conditions of supervised release specified in Section 3583(d) are mandatory. For example, the court must order the defendant not to commit any crimes and to refrain from using unlawful drugs. In addition, the district court may impose, with certain exceptions, any condition set forth as a discretionary condition of probation in 18 U.S.C. § 3563(b). Finally, in the case of an alien defendant who is subject to deportation, the district court "may provide, as a condition of supervised release, that he be deported and remain outside the United States," and the court "may order that he be delivered to a duly authorized immigration official for such deportation."

##### 1. *The Statutory Authorization To "Provide" That Alien Defendants Be Deported Allows District Courts To Require Deportation*

"[I]n all cases involving statutory construction [the] starting point must be the language employed by Congress." *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotations omitted). Section 3583(d) author-

izes district courts to "provide, as a condition of his supervised release, that [an alien defendant] be deported and remain outside the United States." This language is unambiguous: Under Section 3583(d), a district court may require the deportation of an alien defendant as a condition of supervised release. *See Oboh II*, 92 F.3d at 1084 ("We find this language clear and unequivocal."); *Chukwura*, 5 F.3d at 1423 ("The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release").[6]

Despite the obvious import of the statutory text, petitioner and the Solicitor General argue that it does not grant district courts any authority to require deportation. Pet. Br. 13-16; U.S. Br. 16-17. They point out that other portions of Section 3583(d) permit courts to "order" particular conditions of supervised release, whereas the relevant passage permits courts to "provide" that an alien defendant be deported. Thus, they reason, "the court's authority for deportation stands alone in a separate sentence as the only condition for which the court's authority is merely to 'provide.' " Pet. Br. 15; *see also* U.S. Br. 16. In their view, "[t]he congressional choice between the words 'provide' or 'order' decisively shows that § 3583(d) does not grant district courts the jurisdiction to deport aliens." Pet. Br. 13. This argument is without merit.

In the first place, petitioner and the Solicitor General rely on the wrong definition of the word "provide" to support their textual argument. Petitioner asserts that the verb "provide" means to " 'exercise foresight in taking

[6] Indeed, the Solicitor General has previously conceded that "[s]tanding alone, the language stating that 'the court may provide . . . that [the defendant] be deported and remain outside the United States' lends support to the Eleventh Circuit's holding that Section 3583(d) authorizes a district court to enter a judicial order of deportation, without any occasion for recourse to the procedures established by the INA for deporting aliens." U.S. *Chukwura* Br. 10.



due measures in view of a possible event.' " Pet. Br. 16 (quoting 12 *Oxford English Dictionary* 713 (2d ed. 1989)); *see also* U.S. Br. 16-17. As the dictionary on which petitioner relies makes clear, however, when used in this preparatory or precautionary sense the verb "provide" always takes the construction "for" or "against." *See* 12 *Oxford English Dictionary* 713 (2d ed. 1989); *see also Webster's Third New International Dictionary* 1827 (1976) ("to take precautionary measures: make provision—used with *against* or *for*"); *cf.* U.S. Const., preamble ("provide for the common defence"). Petitioner and the Solicitor General tacitly concede as much by repeatedly asserting that Section 3583(d) authorizes the district court to provide *for* an alien's deportation. *See* Pet. Br. 5, 8, 12, 16, 20, 21; U.S. Br. 1[illegible], 19.

Congress, however, did not authorize district courts merely to provide "for" the deportation of an alien defendant; rather, Section 3583(d) allows the court to "provide, as a condition of supervised release, *that* he be deported" (emphasis added). Such a condition allows a district court to *require* an alien defendant's deportation, not merely to prepare for the possibility of deportation by the INS. *See Oboh II*, 92 F.3d at 1084 ("The language states that a sentencing court may require that a defendant 'subject to deportation' be deported as a condition of supervised release").

As used in this context, the verb "provide" means "to make a proviso or stipulation." *Webster's Third New International Dictionary* 1827 (1976); *see also Webster's New International Dictionary* 1994 (2d ed. 1946) ("to stipulate; as, the contract provides that the work be well done"); 12 *Oxford English Dictionary* 713 (2d ed. 1989) ("To make it, or lay it down as, a provision or arrangement; to stipulate *that*"). Congress frequently uses the term in this sense, as has this Court in its rulemaking capacity. *See, e.g.*, 7 U.S.C. § 2305(a); 28 U.S.C. §§ 157(a), 654(b); 39 U.S.C. § 3007(a); Fed. R. Crim.

P. 56; Fed. R. Civ. P. 77(c); Fed. R. App. P. 45. Thus, a statutory grant of authority to "provide . . . that" a defendant be deported as a condition of supervised release is an authorization to impose deportation as a mandatory and binding obligation.

The context in which "provide" appears in the statute further demonstrates that Congress used the verb in its mandatory sense. Immediately preceding the grant of authority to "provide" that alien defendants be deported, Section 3583(d) authorizes the court to impose, as a discretionary condition of supervised release, "any condition set forth as a discretionary condition of probation in [18 U.S.C.] section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20)." The referenced probation statute states in turn that the court may "provide" that the defendant be subjected to a variety of restrictions. 18 U.S.C. § 3563(b). For example, "[t]he court may provide . . . that the defendant . . . reside in a specified place or area, or refrain from residing in a specified place or area." 18 U.S.C. § 3563(b)(14). Congress used a similar construction in detailing the mandatory conditions of probation. *See, e.g.*, 18 U.S.C. § 3563(a)(1) ("The court shall *provide*, as an explicit condition of a sentence of probation . . . that the defendant not commit another Federal, State, or local crime") (emphasis added). It is indisputable that the court's power to "provide" that a defendant comply with the terms of his probation comprehends the imposition of mandatory requirements, not mere precatory suggestions.

Thus, when Section 3583(d) is read in conjunction with 18 U.S.C. § 3563, which was also enacted as part of the Sentencing Reform Act of 1984 and is incorporated by reference in Section 3583(d), it is apparent that Congress used "provide . . . that" to mean "require" (or, equivalently, "order"). *See Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995) ("the 'normal rule of statutory construction [is] that 'identical words used in different parts of the same act are intended to have the same meaning' "); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("identical terms within an Act bear the same meaning"). Giving the same meaning to identical statutory terms is particularly appropriate where, as here, the separate statutory uses of the same term are interrelated and proximate. *C.I.R.* v. *Lundy*, 116 S. Ct. 647, 655 (1996). Section 3583(d), accordingly, must be construed to authorize district courts to require that alien defendants be deported.



### 2. *District Courts May Require That Alien Defendants Be Deported Without Recourse To Administrative Proceedings*

Before requiring that a defendant be deported as a condition of supervised release, the district court must determine whether the defendant is an "alien" who is "subject to deportation." The INA contains a definition of "alien" and specifies which aliens are "deportable." 8 U.S.C. §§ 1101(a)(3) & 1251(a).[7] A fair reading

[7] An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Aliens subject to deportation include those who are in the country unlawfully and those who have been convicted of crimes involving moral turpitude, controlled substance or firearms offenses, or defined aggravated felonies. *See* 8 U.S.C. § 1251(a). As noted above (at 4 n.2), petitioner did not dispute his status as a deportable alien in the district court, and he has therefore waived any argument to that effect. *See also* J.A. 16 n.1. In any event, there is no question but that these statutory preconditions are satisfied in this case. Petitioner's status as an alien was a substantive element of his offense of conviction. 8 U.S.C. § 1326. The indictment to which petitioner pleaded guilty charged him with being an alien (*see* J.A. 2), and the district court's acceptance of the plea indicates that the court was satisfied that there was a factual basis therefor. *See* Fed. R. Crim. P. 11(f). Moreover, petitioner's crime of unlawfully reentering the United States after having been deported plainly rendered him deportable. 8 U.S.C. § 1251(a)(1)(B) ("[a]ny alien who . . . is in the United States in violation of this chapter or any other law of the United States is deportable"). Thus, petitioner indisputably is an "alien" who is "subject to deportation."

of Section 3583(d) therefore indicates that a district court should refer to the INA in determining whether a defendant is an alien subject to deportation (or, equivalently, deportable). *Cf. Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (" '[w]here Congress borrows terms of art in which are cumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed' ").

The Solicitor General apparently does not agree that "deportable" and "subject to deportation" mean the same thing. Instead, he contends that "[c]lassification as a deportable alien does not subject an alien to deportation" under the INA because there are various avenues for seeking administrative relief from deportation. U.S. Br. 26-27. But a judicial determination that an alien defendant is "subject to deportation" does not necessarily "subject an alien to deportation" under Section 3583(d) either; the Solicitor General's argument rests on a transformation of the adjective "subject" into a verb that has a different connotation.[8] The statutory terms "deportable" and "subject to deportation" plainly carry the same meaning (*see Webster's Third New International Dictionary* 605 (1976) (defining "deportable" as "subject to deportation")), and describe an alien who meets the threshold eligibility requirements for potential removal from this country. Indeed, the INA itself uses the two terms interchangeably. *See* 8 U.S.C. §§ 1251(a), 1251(b), 1252(i).

[8] The relevant statutory phrase in Section 3583(d)—"is subject to deportation"—uses the word "subject" in its adjectival form to mean "suffering a particular liability or exposure." *Webster's Third New International Dictionary* 2275 (1976). The Solicitor General's formulation—"subject an alien to deportation"—uses the word "subject" as a verb to mean "to cause to undergo or submit to." *Ibid.* Obviously, these different forms of the word have different meanings.



Petitioner argues that "[t]he meaning of 'subject to deportation' is not intrinsically apparent but rather requires reference to 8 U.S.C. § 1251 and § 1252(b), which define 'deportable aliens' *and* the 'proceedings to determine deportability.' " Pet. Br. 16 (emphasis added). But the fact that Section 3583(d) essentially incorporates by reference the INA's definitions of "alien" and "deportable" does not somehow transform Article III judges into INS hearing officers subject to all of the procedures applicable to administrative deportation proceedings. Alienage and deportability are status characteristics; either a defendant is an alien who is subject to deportation, or he is not. Congress has recognized that both determinations can be made *before* any administrative proceedings are initiated. *See* 8 U.S.C. § 1252(i) ("In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction").

Section 3583(d) on its face vests the determination whether an alien defendant should be deported in the district courts, without recourse to the procedures established for administrative deportations under the INA. In fact, without an initial *judicial* determination that the defendant is "subject to deportation," the court has no way of knowing whether the last sentence of Section 3583(d) —however construed—is even applicable. *See* 18 U.S.C. § 3583(d) ("*If* an alien defendant is subject to deportation, the court may provide . . . that he be deported . . . and may order that he be delivered to [the INS]") (emphasis added). The structure of the statute thus demonstrates the flaw in petitioner's argument that the determination whether an alien is "subject to deportation" is "a finding that must be made by the INS." Pet. Br. 7; *see* U.S. Br. 26-27. Indeed, the argument that the statute leaves deportability determinations for the INS is entirely circular. *See, e.g., Sanchez*, 923 F.2d at 237 ("subsection 3583(d) simply permits the sentencing court to order

. . . that 'an alien defendant [who] is subject to deportation' be surrendered to immigration officials . . . for the purpose of determining whether he is 'an alien defendant . . . subject to deportation' "); Pet. Br. 23 (relying on this passage from *Sanchez*); U.S. Br. 30 (same).

The final clause of the operative sentence of Section 3583(d) provides further confirmation that no administrative proceedings are required before an alien defendant is deported. If the district court requires, as a condition of supervised release, that an alien defendant be deported, the court may also order that the defendant be delivered to the INS "for *such* deportation" (emphasis added)—*i.e.*, the deportation imposed by the court as a condition of supervised release. Congress's use of the word "such," which petitioner omits from his quotation of the statute (Pet. Br. 13), demonstrates that the judicial order of deportation is sufficient to require INS officials to carry out the ministerial act of removing the defendant from the country. No further administrative proceedings are necessary.

### 3. *Section 3583(d) Does Not Conflict With The Immigration And Nationality Act*

Petitioner argues that, if Section 3583(d) is construed in accordance with its plain language to authorize judicial orders of deportation, it cannot be read *in pari materia* with the INA because "significant portions of 8 U.S.C. §§ 1103(a), 1251, and 1252 are rendered meaningless." Pet. Br. 22; *see* U.S. Br. 25. This argument is incorrect.

Title 8 U.S.C. § 1103(a) states that "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." This is a broad and general grant of authority to the Attorney General. Title 18 U.S.C. § 3583(d), by contrast, is a narrowly drawn provision that authorizes district courts, in defined circumstances, to require that alien defendants



be deported as a condition of supervised release. Under the well-established maxim that a specific provision prevails over a more general one (*e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)), the general delegation of authority to the Attorney General does not override the specific authority granted to district courts. *Cf. Castaneda-Gonzalez* v. *INS*, 564 F.2d 417, 423 (D.C. Cir. 1977) (concluding that general grant of authority to Attorney General does not subsume the power to determine the validity of labor certificates, which Congress delegated in the INA to the Secretary of Labor).

Title 8 U.S.C. § 1251 provides that "[a]ny alien . . . in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens." Section 1251 clearly confers on the Attorney General the authority to determine whether an alien is deportable and to order him deported. It says nothing, however, about whether a court can make a similar determination and order—the authority granted in Section 3583(d). Likewise, 8 U.S.C. § 1252(b), which sets forth "the sole and exclusive procedure for determining the deportability of an alien *under this section*" (emphasis added), is inapposite because the district court in this case did not proceed under Section 1252(b).[9]

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[9] A recently enacted revision of the INA's deportation procedures states that "[u]nless otherwise specified *in this Act*, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (1996), *reproduced at* 138 Cong. Rec. H11798 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1230(a)(3) (emphasis added). This provision is effective April 1, 1997. *See* IIRAIRA § 309, *reproduced at* 138 Cong. Rec. H11808 (daily ed. Sept. 28, 1996). Athough "repeals by implication are not favored" (*Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987)), it could be argued that

#### 4. *The Interpretation Of Section 3583(d) Urged By Petitioner And The Solicitor General Would Deprive The Relevant Statutory Language Of Operative Effect*

Petitioner argues that a sentencing court "is only authorized by Congress to 'provide' for the alien's deportation at the conclusion of his custodial sentence by 'order-[ing]' his surrender to immigration officials." Pet. Br. 20-21. Similarly, the Solicitor General contends that the final sentence of Section 3583(d) merely permits a court to "provide for deportation of an alien defendant by the Attorney General" and thereby ensure that "supervised release would not stand as an obstacle to deportation." U.S. Br. 19; *see id.* at 17-23. But construing Section 3583(d) to do nothing more than authorize the court to order the delivery of an alien defendant to the INS for potential deportation would violate "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village Inc.*, 503 U.S. 30, 36 (1992).

Section 3583(d) states that the court "may provide . . . that [the defendant] be deported . . . *and* may order that he be delivered to a duly authorized immigration official for such deportation" (emphasis added). The construction urged by petitioner and the Solicitor General would be accomplished by the second clause alone; Congress's use of the conjunctive, however, indicates that the two clauses have independent significance. Because the latter clearly authorizes the court to order the alien delivered to the INS for deportation, the former must mean (as it says) that the court can also require his deportation.

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this provision eliminates the authority of district courts to order deportation under Section 3583(d) after April 1, 1997, because Section 3583(d) is not specifically referenced in the INA (as amended by IIRAIRA). Thus, the question presented in this case may lack any continuing importance after IIRAIRA becomes effective. *Cf. Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955) (dismissing writ of certiorari as improvidently granted in light of newly enacted statute).



Contrary to the arguments advanced by the Solicitor General, moreover, the last sentence of Section 3583(d) was not necessary merely to ensure that supervised release did not stand as a potential "obstacle" to deportation. Congress expressly eliminated that concern by amending the INA to provide that "supervised release . . . shall not be a ground for deferral of deportation." 8 U.S.C. § 1252(h), as amended by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 220(b), 98 Stat. 1987, 2028. Indeed, if the Solicitor General's argument were valid, supervised release would pose an obstacle to administrative deportation of criminal aliens in all cases where district courts choose not to issue deportation orders under Section 3583(d). The relevant statutory provisions cannot plausibly be read in that fashion.[10]

The Solicitor General's related contention that Section 3583(d) merely "preserves the established authority of the Attorney General to effect the deportation of an alien and provides for carrying out such an order *without violating the statutory terms of supervised release*" (U.S. Br. 22 (emphasis added)) is equally unfounded. The

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[10] Indeed, wholly apart from the last sentence of Section 3583(d), district courts and the INS have ample authority to ensure that alien criminals are turned over to the INS for possible administrative deportation after they have served their terms of imprisonment. The penultimate sentence of Section 3583(d) empowers a district court to impose as a condition of supervised release "any other condition it considers to be appropriate." In determining conditions it considers to be appropriate, the district court enjoys broad discretion (*e.g.*, *United States* v. *Phaneuf*, 91 F.3d 255, 262-263 (1st Cir. 1996); *United States* v. *Showalter*, 933 F.2d 573, 574 (7th Cir. 1991)), and plainly could direct a deportable alien defendant to report to the INS as a condition of supervised release. *Cf. United States* v. *Polchlopek*, 897 F.2d 997 (9th Cir.) (per curiam) (upholding condition that defendant travel to Canada and appear in court), *cert. denied*, 498 U.S. 828 (1990). Alternatively, the INS could arrest and detain such a defendant on its own authority pending deportation (8 U.S.C. § 1357(a); 8 C.F.R. § 242.2), or could issue and lodge a detainer directing the appropriate criminal justice agency to maintain custody of the defendant for a period of time pending the INS's assumption of custody. 8 C.F.R. § 242.2.

Solicitor General does not identify any mandatory term of supervised release that would be violated if the INS were to institute administrative deportation proceedings and deport an alien defendant on supervised release, and there is none.[11]

The Solicitor General also errs in contending that Section 3583(d) was necessary to avoid the risk that "[d]eportation . . . would make it impossible for a probation officer to fulfill various statutory duties of supervision." U.S. Br. 18. The statute provides that a defendant on supervised release "shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court." 18 U.S.C. § 3601. If the defendant were deported, no supervision would be "warranted." Moreover, the Solicitor General's arguments would be equally applicable to Congress's recent decision to authorize sentencing courts to impose deportation as a condition of *probation* (*see infra* at 23 n.13, 38-39), yet this provision clearly grants deportation authority to the district courts as well.[12]

[11] The Solicitor General points to "conditions such as reporting, in person, to a probation officer or having a probation officer visit the supervisee's home or workplace" as inconsistent with deportation. U.S. Br. 18. But these are merely discretionary conditions of probation or supervised release under the Sentencing Reform Act, and thus district courts possess plenary authority to eliminate or make exceptions to these conditions without recourse to the last sentence of Section 3583(d).

[12] The Solicitor General also argues that the last sentence of Section 3583(d) serves the purpose of "establishing an efficient means of reimprisoning an alien defendant who reenters the United States" without the need to bring "a new and independent criminal prosecution" for illegal reentry under 8 U.S.C. § 1326. U.S. Br. 23 n.11. Congress had no need to enact the deportation provision of Section 3583(d), however, if this were all it sought to achieve. It is a mandatory condition of supervised release that the defendant "not commit another Federal . . . crime" (18 U.S.C. § 3583(d)), and district courts may revoke supervised release on that ground regardless of whether a separate criminal prosecution is brought. U.S.S.G. § 7B1.1, comment. (note 1); 18 U.S.C. § 3583(e)(3). Thus, wholly apart from the last sentence of Section 3583(d), district courts are authorized to reimprison alien defendants who reenter the United States in violation of 8 U.S.C. § 1326 during their term of supervised release, and no independent criminal prosecution is required.



In short, the statutory interpretation proposed by petitioner and the Solicitor General would render the relevant language of Section 3583(d) entirely superfluous and unnecessary. That interpretation should therefore be rejected, because "th[is] Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995).[13]

### B. The Non-Textual Arguments Advanced By Petitioner And The Solicitor General Do Not Alter The Plain Meaning Of Section 3583(d)

As demonstrated above, the plain language of Section 3583(d) authorizes district courts to order the deporta-

[13] The Solicitor General suggests (U.S. Br. 20 n.9) that Section 3583(d) should not be construed to authorize judicial orders of deportation because the only judicial means of enforcing such orders would be revocation or modification of the defendant's supervised release. Congress was certainly entitled to assume, however, that the INS would enforce judgments of conviction imposing deportation as a condition of supervised release if the sentencing court chose to "order that [the defendant] be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d); *see Dunlop* v. *Bachowski*, 421 U.S. 560, 575-576 (1975) (adopting assumption that the Executive "would proceed appropriately without the coercion of a court order" once court had ruled), *overruled in part on other grounds, Local No. 82, Furniture Moving Drivers* v. *Crowley*, 467 U.S. 526, 549-50 n.22 (1984). Indeed, Congress recently chose precisely the same mechanism for authorizing deportation of defendants sentenced to probation (IIRAIRA § 374(b)(3), *reproduced at* 138 Cong. Rec. H11814 (daily ed. Sept. 28, 1996), to be codified at 18 U.S.C. § 3563(b)(21)), and the Solicitor General concedes (U.S. Br. 38) that that provision vests district courts with authority to ensure that their deportation orders are carried out. In any event, federal courts are not without power to enforce judicially imposed conditions. *See, e.g.*, 28 U.S.C. § 566(a) ("It is the primary role and mission of the United States Marshals Service . . . to obey, execute, and enforce all orders of the United States District Courts"); 28 U.S.C. § 1651(a).

tion of alien defendants as a condition of supervised release, without recourse to the procedures established by the INA. Nothing in the traditional allocation of deportation authority, the history of Section 3583(d), or subsequent legislation alters this conclusion.

### 1. *Section 3583(d) Does Not Upset The Traditional Allocation Of Deportation Authority*

Petitioner argues that Section 3583(d) should not be interpreted to "divest the Executive Branch of nearly two centuries of plenary authority to decide what to do with a particular alien." Pet. Br. 16; *see also* U.S. Br. 30-31. On the contrary, Section 3583(d) is only one of a number of statutes whereby Congress has granted authority to the district courts to make deportability determinations.

The Constitution grants Congress plenary power over immigration and naturalization matters. U.S. Const., art. I, § 8, cl. 4; *see, e.g., United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 864 (1982); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954). Congress has expressly recognized that nationality is a suitable subject for judicial inquiry. 8 U.S.C. § 1105a(a)(5) (providing for judicial resolution of whether a person subject to an administrative deportation order is a national of the United States); *see also Quock Ting* v. *United States*, 140 U.S. 417 (1891) (reviewing citizenship determination on habeas corpus). Indeed, this Court has held that an American resident resisting deportation on the ground of nationality is constitutionally entitled to a judicial determination of the question of alienage, relying in part on "[t]he difference in security of judicial over administrative action" in immigration matters. *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922). Moreover, it is clear that Congress can constitutionally delegate deportation authority to the courts. *See, e.g., Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892).



Although Congress granted the President the authority to expel aliens in 1798, that statute expired in 1800 and Congress passed no further legislation on the subject until 1875. Auerbach, *Immigration Laws of the United States* 3 (2d ed. 1961). Just a few years later, Congress passed the Chinese Exclusion Acts, which expressly vested the decision whether to deport aliens in the district courts. *See* Act of May 6, 1882, ch. 1226, § 12, 22 Stat. 61, as amended by Act of July 5, 1884, ch. 220, § 12, 23 Stat. 117-118; *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888) (discussing the role of the judiciary under this statute). Congress amended the Chinese Exclusion Acts a number of times, consistently retaining a scheme of judicial deportation. *See, e.g.*, Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25-26 ("any Chinese laborer . . . who shall neglect, fail or refuse to comply with the provisions of this act, . . . [may be] taken before a United States judge, *whose duty it shall be to order that he be deported from the United States* [unless certain conditions are met]") (emphasis added).[14] As this Court explained, "[d]eportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings." *Ng Fung Ho*, 259 U.S. at 279; *see also Fong Yue Ting*, 149 U.S. at 728-729. Thus, it is hardly unprecedented for Congress to vest in the federal courts the power to determine whether certain aliens shall be deported.[15]

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[14] *See also* Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 479; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; Act of May 5, 1892, ch. 60, §§ 2, 6, 27 Stat. 25-26; Act of Nov. 3, 1893, ch. 14, § 6, 28 Stat. 7; Act of Aug. 18, 1894, ch. 301, 28 Stat. 390; Act of Mar. 3, 1901, ch. 845, 31 Stat. 1093; Act of Apr. 29, 1902, ch. 641, 32 Stat. 176; Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 394, 428.

[15] Nor has Congress always chosen to give the Executive Branch sole authority to initiate deportation proceedings. The 1884 legislation granted "all peace officers of the several States and Territories" authority to bring suspected aliens "before some justice, judge, or commissioner of a court of the United States" for removal proceedings. Act of July 5, 1884, ch. 220, § 12, 23 Stat. 118.

In the General Immigration Act of 1917, Congress for the first time enacted legislation to provide for the deportation of aliens convicted of crimes committed after entry into the United States. Hutchinson, *Legislative History of American Immigration Policy 1798-1965* 451 (1981). While Congress allocated to the Executive Branch the authority to institute deportation proceedings under this Act, the 1917 legislation provided that a court sentencing a defendant for a crime of moral turpitude could bar immigration officials from deporting the alien on the basis of that crime. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889, codified as amended at 8 U.S.C. § 1251(b)(2) (1988), repealed by the Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050. The judicial recommendation against deportation (JRAD) represented a significant infringement on the discretionary authority of the Executive Branch. *See, e.g., Velez-Lozano* v. *INS*, 463 F.2d 1305, 1308 (D.C. Cir. 1972) (per curiam) ("Such a recommendation, if timely issued, is absolutely binding on the Attorney General and leaves him with no discretionary authority."); *Oboh II*, 92 F.3d at 1086-1087.[16]

Judicial involvement in deportation matters has continued to the present day. Besides enacting Section 3583 (d) in 1984, Congress has authorized additional forms of judicial deportation in several recent statutes. In the Immigration and Nationality Technical Corrections Act of 1994, Congress expressly provided for judicial deportation of criminal aliens under the INA, even in cases where the Attorney General recommends relief from deportation. Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322

[16] Congress's repeal of the JRAD procedure in 1990 hardly "suggests a movement away from providing judicial control which binds the INS." Pet. Br. 30. Rather, it reflects the uniform and continuing trend of recent congressional efforts to facilitate and expedite the deportation of criminal aliens. As correctly construed by the court of appeals in this case, Section 3583(d) is entirely consistent with that legislative trend.



(1994), codified at 8 U.S.C. § 1252a(d) (1994). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress expanded the INA's judicial deportation provision by authorizing a judicial order of deportation against any alien "who is deportable." Pub. L. No. 104-208, § 374, 110 Stat. 3009 (1996), *reproduced at* 138 Cong. Rec. H11813-H11814 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c). Congress also enacted a new provision authorizing court-ordered deportation of criminal aliens upon stipulation, and amended 18 U.S.C. § 3563(b) by authorizing district courts to order deportation as a condition of probation. *Ibid.*[17]

In short, for most of this Nation's history Congress has either required or authorized the courts to play a role in the deportation process.[18] Thus, while it is certainly true

[17] In the Senate Report on the bill that became IIRAIRA, the Judiciary Committee observed that "[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. . . . Aliens who are required by law *or the judgment of our courts* to leave the United States are not thereby subjected to a penalty." S. Rep. No. 249, 104th Cong., 2d Sess., at 7 (1995) (emphasis added). In fact, the bill passed by the Senate would have provided that "any *State* court with jurisdiction to enter judgments in criminal cases is authorized to make a finding that the defendant is deportable." S. 1664, § 165 (emphasis added); *see* 142 Cong. Rec. S4730, S4745 (May 6, 1996).

[18] The cases cited by petitioner in support of the proposition that "district courts lack the jurisdiction to order the deportation of aliens" (Pet. Br. 19) are inapposite because none involved a statute expressly conferring deportation authority on the court. In any event, it is by no means clear that district courts do not have the authority to order the deportation of alien defendants even absent express congressional authorization, because "[t]he sentencing judge has broad discretion in setting probation conditions [or conditions of supervised release], including restricting fundamental rights." *United States* v. *Bolinger*, 940 F.2d 478, 480-481 (9th Cir. 1991); *see, e.g., United States* v. *Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971) (noting that in a previous criminal proceeding

that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature" (*Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982)), giving effect to the plain meaning of Section 3583(d) is in no way at odds with the traditional alloca-

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respondent's "sentence was suspended, and the respondent was placed on probation for three years 'on condition that he return to Mexico and not return to the United States illegally' "); *United States* v. *Janko*, 865 F.2d 1246, 1246-1247 (11th Cir. 1989) (affirming sentence, based upon plea agreement, of "six months in the Attorney General's custody, a [suspended] sentence, and . . . probation on the special condition that [defendants] leave the United States by a certain date and not return other than by lawful means"); *United States* v. *Wieczorek*, 836 F.2d 1343 (4th Cir. 1988) (Table), No. 87-5548, 1988 WL 1083, at *1 (4th Cir. Jan. 7, 1988) (affirming sentence of "three years of probation with the special condition that [the alien defendant] consent to deportation" and noting defendant was deported one week after sentencing); *United States* v. *Negron*, 548 F.2d 1085, 1086 (2d Cir.) (rejecting motion "to vacate as illegally imposed a sentence of ten years imprisonment and a 15-year special parole term, with the special condition that Negron be deported to Colombia, South America, upon completion of the jail sentence" and affirming sentence), *cert. denied*, 433 U.S. 912 (1977); *Reyes-Cerna* v. *INS*, 345 F. Supp. 1348, 1348 (N.D. Ill. 1972) (noting that alien plaintiff suing for permission to reapply for admission to the United States had been previously convicted and given "five years probation with the condition that he be deported to Mexico and not re-enter the United States illegally during the probation period"). Since the passage of the Sentencing Reform Act, district courts can impose conditions of probation or supervised release requiring defendants to "refrain from residing in a specified place" and to "satisfy such other conditions as the court may impose." 18 U.S.C. § 3563(b)(14) & (22); *see* 18 U.S.C. § 3583(d); *see also United States* v. *Gil*, 46 F.3d 1134 (7th Cir. 1995) (Table), Nos. 94-1713 & 94-1959, 1995 WL 23136, at *1 (7th Cir. Jan. 19, 1995) (affirming conviction and sentence of "240 months imprisonment, to be followed by 10 years supervised release, with deportation as a special condition of [such] release"), *cert. denied*, 115 S. Ct. 2014 (1995); *United States* v. *Pugliese*, 960 F.2d 913, 915 (10th Cir. 1992) ("District courts have wide latitude to determine the extent of geographic restrictions as conditions of supervised release").



tion of authority between the Executive and Judicial Branches.[19]

### 2. *The Procedural Differences Between Administrative Deportation And Deportation Under Section 3583(d) Provide No Support For Petitioner's Interpretation Of The Statute*

Petitioner contends that it would have been "extraordinary" and "inconceivable" for Congress to authorize judicial deportation of criminal aliens without providing procedural protections and avenues of relief identical to those available in administrative proceedings. Pet. Br. 17, 30-31. This contention is unpersuasive.

The statutory procedural requirements applicable to administrative deportation proceedings are unexceptional:

> (1) the alien shall be given notice . . . of the nature of the charges against him and of the time and place at which the proceedings will be held;

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[19] Petitioner also argues that "the Eleventh Circuit concluded that Congress *sub silentio* granted the Judicial Branch . . . the authority to deport aliens." Pet. Br. 29. Section 3583(d) is hardly "silent" on this subject, however; it expressly states that district courts may provide that alien defendants be deported as a condition of supervised release. Petitioner is presumably referring to the fact that the legislative history of the Sentencing Reform Act does not appear to shed additional light on the meaning of Section 3583(d). But the rule that statutes mean what they say does not depend for its validity on the existence of confirmatory statements in the legislative history. *See, e.g., Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("It would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992). The case relied upon by petitioner, *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), is not to the contrary, because in that case the statutory text itself did not demonstrate congressional intent to change the law in the manner suggested.

> (2) the alien shall have the privilege of being represented (at no charge to the Government) by such counsel . . . as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. § 1252(b). Contrary to the premise of petitioner's argument, the procedural protections provided to criminal defendants at sentencing are not significantly different from those available in administrative deportation proceedings.

The defendant in a sentencing proceeding has constitutional rights that do not apply in administrative deportation proceedings. *See, e.g., Abel* v. *United States*, 362 U.S. 217, 237 (1960) ("deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions"). Most saliently, criminal defendants (unlike aliens in administrative deportation proceedings) have the right to be represented by court-appointed counsel at sentencing. *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967).

Before deportation may be imposed as a condition of supervised release, moreover, alien defendants must be given reasonable notice, either in the presentence report or by the court itself, that deportation is a potential sentencing consideration. Fed. R. Crim. P. 32(b)(4)(B); *Burns* v. *United States*, 501 U.S. 129 (1991). The sentencing hearing, at which the defendant must be allowed to comment on the proposed sentence, provides an ample opportunity to be heard, and may include the introduction of evidence. Fed. R. Crim. P. 32(c)(1); *see also* U.S.S.G. § 6A1.3 (policy statement) ("When any factor important to the sentencing determination is reasonably in dispute, the



parties shall be given an adequate opportunity to present information to the court regarding that factor").

In addition, a defendant ordered deported as a condition of supervised release can challenge the sentence by appeal (18 U.S.C. § 3742(a)) or by motion attacking sentence (28 U.S.C. § 2255), whereas an alien ordered deported under the INA has relatively limited opportunities for judicial review of the administrative determination, particularly after the implemention of IIRAIRA. *See* Brief for *Amici Curiae* American Immigration Lawyers Ass'n, *et al.* (AILA Br.), at 15-17. While not precisely congruent with the procedures employed in proceedings under the INA, these protections are plainly sufficient to ensure that defendants are not unjustifiably deported under Section 3583(d). *See Oboh II*, 92 F.3d at 1087.[20]

Moreover, the discretionary nature of the district court's authority under Section 3583(d) provides a complete response to petitioner's concern that "aliens deported under § 3583(d) would be deprived of . . . the opportunity to obtain asylum or other discretionary relief available in INS proceedings." Pet. Br. 30-31; *see also* U.S. Br. 29 & n.13; AILA Br. 13. Section 3583(d) states that a district court "*may* provide . . . that [an alien defendant] be deported" (emphasis added). If the probation officer (or the district court) notifies an alien defendant that deportation may be an appropriate condition of his supervised release, the defendant is free to argue that he should not be deported for any reason—including, but not limited to, all of the grounds available in administrative proceed-

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[20] Consequently, petitioner and his *amici* err in contending that allowing judicial orders of deportation under Section 3583(d) would violate due process. *See* Pet. Br. 25-27; Brief for *Amicus Curiae* American Bar Association 6-21; AILA Br. 18-24. *Cf.* U.S. Br. 36 n.18 ("We do not agree . . . that, if Section 3583(d) were interpreted to grant district courts authority to enter judicial orders of deportation, constitutional problems would arise.").

ings—and the district court has ample authority to decline to order deportation on such grounds.[21]

### 3. *The Predecessor Statutes To Section 3583(d) Do Not Undermine The Plain-Language Interpretation Of That Provision*

Petitioner and the Solicitor General assert that the deportation clause of Section 3583(d) appears to derive from former 18 U.S.C. § 4212 (1976) (repealed 1984), a statute that authorized federal parole agencies to release alien prisoners to the INS for deportation. Pet. Br. 17-22; U.S. Br. 20-23.[22] They argue that, because the parole board apparently had no independent authority to order

[21] For example, aliens who are convicted of aggravated felonies are deportable and generally cannot request discretionary relief in an administrative deportation proceeding. *See* 3 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 71.05[2][c] (1996) (describing restrictions on aggravated felons). At a sentencing hearing, by contrast, a defendant convicted of an aggravated felony could nonetheless argue that the court should not impose deportation as a condition of his supervised release, and the court—unlike the Attorney General—would have the authority to exercise its discretion in the defendant's favor.

[22] In its most recent iteration before being repealed, the parole statute provided:

> When an alien prisoner subject to deportation becomes eligible for parole, the [Parole] Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.
>
> Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

18 U.S.C. § 4212 (1976). Section 4212 originated in the Act of Mar. 2, 1931, ch. 371, 46 Stat. 1469, codified at 18 U.S.C. § 716, amended by Act of June 25, 1948, ch. 645, § 4204, 62 Stat. 854, and recodified at 18 U.S.C. § 4204 (1952), amended by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 4212, 90 Stat. 219, 227 (1976), and recodified at 18 U.S.C. § 4212, repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, §§ 218(a)(5) & 235, 98 Stat. 2027 & 2031.



deportation (*Secchi* v. *U.S. Bureau of Immigration*, 58 F. Supp. 569 (M.D. Pa. 1945)), Congress must not have granted such authority to the district courts in enacting Section 3583(d). *See, e.g.*, Pet. Br. 22 (" 'This background suggests that § 3583(d), like its predecessor governing parole, does not authorize a judicial order of deportation' ") (quoting *Oboh II*, 92 F.3d at 1091 (Barkett, J., dissenting)). This argument suffers from several fatal flaws.

First, the predecessor to § 4212 was necessary to coordinate the roles of the United States Board of Parole and the Bureau of Immigration, because parole rules at that time required that parolees remain within the jurisdiction of the sentencing court. *See* H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930); U.S. Br. 21. Congress therefore provided that the parole board could "authorize the release" of a prisoner who was both eligible for parole and subject to deportation, and that such a prisoner "shall be delivered to the duly authorized immigration official for deportation." 18 U.S.C. § 4212 (1976).

In contrast to the limited powers of federal parole agencies, the power of federal district courts to impose terms of supervised release is not subject to any territorial constraints. When Congress restructured the federal sentencing scheme in 1984, it abolished any requirement that released prisoners remain within the jurisdiction of the sentencing court. *See* 18 U.S.C. § 3563(b)(15) ("The court *may* provide . . . that the defendant . . . remain within the jurisdiction of the court") (emphasis added); *see also* 18 U.S.C. § 3583(d) ("[t]he court *may* order . . . any condition set forth as a discretionary condition of probation") (emphasis added). There was, accordingly, no need for a statute authorizing courts to order criminal defendants delivered to the INS for the initiation of administrative deportation proceedings. As discussed above (*see supra* at 21-22 & n.10), such an order is well within the court's authority to require a defendant to satisfy

"any . . . condition [the court] considers to be appropriate" (18 U.S.C. § 3583(d)), and would not conflict with any of the mandatory terms of supervised release.

Second, although Congress may have borrowed some language from Section 4212 in enacting Section 3583(d), the substantive differences between the statutes are striking. Section 3583(d) states that when a district court is sentencing an alien defendant who is subject to deportation, the court may "provide . . . that he be deported." Section 4212, in contrast, stated that the Parole Commission "may authorize the release" of an alien prisoner who was subject to deportation. If Congress had truly intended to invest the court only with power analogous to that previously exercised by the parole agencies under Section 4212, there would have been no reason to alter this language.

Moreover, if the Parole Commission authorized the release of an alien defendant pursuant to Section 4212, the statute provided that he "shall be delivered" to immigration officials "for deportation." In contrast, if a district court orders an alien defendant deported pursuant to Section 3583(d), the court "may order" that he be delivered to the INS "for *such* deportation" (emphasis added). The reference to "such" deportation necessarily contemplates the court-ordered deportation authorized by Section 3583(d), not an administrative order of deportation. These significant structural and textual differences between the statutes confirm that, although Section 4212 was merely a release and delivery provision, Section 3583(d) in fact authorizes district courts to require the deportation of alien defendants.

#### 4. *The Subsequent Legislation Cited By Petitioner And The Solicitor General Does Not Affect The Proper Interpretation Of Section 3583(d)*

Petitioner complains that the Eleventh Circuit's interpretation of Section 3583(d) "cannot logically be squared" (Pet. Br. 24) with the INA's judicial deportation provi-



sion, which Congress enacted in 1994 and modified recently in the IIRAIRA. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322 (1994), codified at 8 U.S.C. § 1252a(d), amended by IIRAIRA § 374, *reproduced at* 138 Cong. Rec. H11813-H11814 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c); *see also* U.S. Br. 33-39. These amendments, however, do not undermine the court of appeals' plain-language interpretation of Section 3583(d).

The 1994 amendment added a new provision to the INA which grants the district courts "jurisdiction to enter a judicial order of deportation at the time of sentencing" in cases involving certain criminal aliens. 8 U.S.C. § 1252a(d)(1) (1994). The IIRAIRA amended (and renumbered) this provision to make it applicable to any alien defendant "who is deportable." IIRAIRA § 374(a)(1), *reproduced at* 138 Cong. Rec. H11813 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c)(1). Judicial orders of deportation under 8 U.S.C. § 1252a(d) are made upon request by the United States Attorney with the concurrence of the Commissioner of the INS, and the district court is authorized to grant or deny discretionary relief from deportation.

According to petitioner, it would be "anomalous" to hold that *both* 8 U.S.C. § 1252a(d) and Section 3583(d) authorize the entry of judicial deportation orders, particularly because Section 3583(d) assertedly contains no "procedural safeguards" and does not provide for the possibility of relief from deportation. Pet. Br. 24; *see also* U.S. Br. 35-37. As noted above (*supra* at 29-32), however, Section 3583(d) determinations are subject to all of the procedural protections applicable in sentencing hearings generally (including the right to appeal adverse determinations), and those protections are not meaningfully different from the procedural rights provided by 8 U.S.C. § 1252a(d). Proceedings under either statute provide

comparable, though not identical, procedural safeguards against unjustifiable deportation and offer opportunities for relief from deportation.

Petitioner and the Solicitor General thus err in contending that the court of appeals created a statutory anomaly by construing Section 3583(d) to authorize "summary" deportation for minor offenders while 8 U.S.C. § 1252a(d) provides procedural protections for more serious offenders. Pet. Br. 26; *see* U.S. Br. 37. Deportation under Section 3583(d) is hardly "summary," and in any event there is no basis for the claim that Section 3583(d) applies to minor offenders while 8 U.S.C. § 1252a(d) governs only the most heinous criminals. To the contrary, Section 3583(d) is potentially applicable to all relatively serious offenders (including those who commit "heinous" crimes), whereas 8 U.S.C. § 1252a(d) encompasses more minor offenders.[28]

The Solicitor General suggests that the court of appeals' interpretation of Section 3583(d) "render[s] Section 1252a(d) meaningless," and argues that "Congress must be presumed not to have performed such 'a useless act' in enacting Section 1252a(d)." U.S. Br. 37 (citation omitted). But the plain language of Section 3583(d) can easily be given effect without depriving 8 U.S.C. § 1252a(d) of its separate sphere of operation. Although Section 3583(d) and 8 U.S.C. § 1252a(d) potentially apply to many of the same defendants, they serve different functions. Section 3583(d) is purely a sentencing provision concerning the power of the district court; Section 1252a(d) is a provision of the INA authorizing the Attorney General's delegees to seek and obtain a deportation order in a judicial rather than an administrative forum.

[28] Deportation under Section 3583(d) is an option only for defendants who have been sentenced to both a term of imprisonment and a term of supervised release. 18 U.S.C. § 3583(a); *see* U.S.S.G. § 5D1.1. Title 8 U.S.C. § 1252a(d), by contrast, encompasses less culpable defendants who have not been sentenced to any term of imprisonment at all. Thus, for example, an alien who commits two crimes of moral turpitude (such as fraud, *see Jordan* v. *DeGeorge*, 341 U.S. 223, 232 (1951) ("crimes in which fraud [is] an ingredient have always been regarded as involving moral turpitude")) may be subject to a judicial order of deportation under 8 U.S.C. § 1252a(d). *See* 8 U.S.C. § 1251(a)(2)(A)(ii). But the same defendant might not receive a term of imprisonment (*see* U.S.S.G. § 2F1.1) and accordingly would be ineligible for supervised release—including the deportation provision of Section 3583(d). To be sure, many defendants would be potential candidates for deportation under both statutes, but it is not precisely correct to suggest (*see* U.S. Br. 37) that Section 3583(d) is broader than 8 U.S.C. § 1252a(d).



Although the Government may "comment on" a criminal defendant's sentence (Fed. R. Crim. P. 32(c)(1)), sentencing determinations are made by the district court with the assistance of the probation officer, a judicial employee. Section 3583(d) sets forth the court's authority to include in the sentence of a deportable alien a requirement that the defendant be deported upon his release from prison; it is purely a grant of sentencing authority to the *Judiciary*. Thus, while the Government can suggest that such a condition is appropriate, it cannot appeal from the district court's refusal to require that the defendant be deported. *See* 18 U.S.C. § 3742(b). Moreover, given that Section 3583(d) is purely a sentencing provision, Congress had no cause to specify procedures different from those applicable to all other aspects of criminal sentencing.

The INA's judicial deportation provision, by contrast, is a mechanism whereby the Attorney General's delegees can request an order of deportation at the time of sentencing, obviating the need for a later administrative proceeding; it is a grant of initial authority to the *Executive*, subject to judicial review. If the district court denies a request for a judicial order of deportation under the INA, the Government may appeal. 8 U.S.C. § 1252a(d)(3)(A)(i). And because a proceeding under Section 1252a(d) is initiated by the Attorney General's delegees and takes the place of an administrative proceeding, it is unsurpris-

ing that Congress specified that the INA's procedures be followed.

Thus, Congress simply created two alternative mechanisms for deporting criminal aliens, one within the sole discretion of the federal courts as a sentencing option and the other aimed at expanding the Attorney General's opportunities to expedite the deportation of criminal aliens deemed undesirable by the Executive. It is not "extraordinary" (U.S. Br. 37) that the procedures employed under Section 3583(d) vary in certain respects from those applicable to proceedings under 8 U.S.C. § 1252a(d); rather, it is entirely consistent with Section 3583(d)'s role as purely a sentencing provision. By the same token, immigration legislation enacted since 1984 does not render the plain meaning of Section 3583(d) "illogical" (U.S. Br. 37)—it simply indicates that different Congresses attacked the same problem in different ways, and chose to create more than one avenue for expediting the removal of criminal aliens from the United States.[24]

For the same reasons, Section 3583(d) neither conflicts with nor renders superfluous the newly enacted authorization for district courts to order deportation as a condition of probation. *See* IIRAIRA § 374(b)(3), *reproduced at* 138 Cong. Rec. H11814 (daily ed. Sept. 28, 1996), to be codified at 18 U.S.C. § 3563(b)(21). Pro-

[24] Although petitioner correctly observes that "[t]he Eleventh Circuit's interpretation would create two parallel deportation processes" (Pet. Br. 7), his argument that such a result raises equal protection concerns (Pet. Br. 25-27) is baseless. In the first place, it is far from clear that any differences in procedures would result in different treatment for similarly situated aliens. In any event, "classifications among aliens made pursuant to the immigration laws 'need only be supported by some rational basis to fulfill equal protection guarantees' " (*United States* v. *Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980)); it is not irrational for Congress to have relied on the traditional judicial procedures for criminal sentencing while requiring administrative-type procedures when the Attorney General seeks a judicial order of deportation in lieu of an administrative order.



bation and supervised release are mutually exclusive sentencing options (*see* 18 U.S.C. §§ 3551(b) & 3583(a)), and thus there is no overlap between this new provision and Section 3583(d).

Indeed, Congress's decision to authorize deportation as a condition of probation bolsters the plain-language interpretation of Section 3583(d). By definition, defendants who are sentenced to supervised release have also been sentenced to terms of imprisonment (*see* 18 U.S.C. § 3583(a)), and thus they have been found to be more culpable than defendants sentenced to probation in lieu of imprisonment. *See United States* v. *Granderson*, 114 S. Ct. 1259, 1266 (1994) ("Persons serving post-incarceration terms of supervised release generally are more serious offenders than are probationers."). It would be unreasonable to conclude that Congress has conferred on the courts the authority to order deportation of alien defendants as a condition of probation, but has not authorized the courts to impose deportation as a condition of supervised release for the clearly more culpable defendants subject to that sentence. Yet that would be the result of the interpretation urged by petitioner and the Solicitor General.

More fundamentally, petitioner and the Solicitor General err in placing any reliance on the recent amendments to the INA in interpreting Section 3583(d). In essence, they ask this Court to divine the intent of the 98th Congress, which enacted Section 3583(d), from legislation produced by Congresses convened a decade or more later. As the foregoing discussion amply demonstrates, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *see also Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (acknowledging "all the usual

difficulties inherent in relying on subsequent legislative history").[25]

The use of subsequent legislative history is particularly inappropriate where, as in this case, it is offered to cloud an otherwise unambiguous statute. *Cf. Ratzlaf* v. *United States*, 114 S. Ct. 655, 662-663 (1994).[26] It bears re-emphasizing what Congress authorized the district courts to do:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d). The plain language of the statute authorizes district courts to require the deportation of an alien defendant as a condition of supervised release, and to require that he be delivered to the INS for deportation in conformity with that court order. Nothing in the subsequent legislation relied on by petitioner has altered that plain meaning. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it

[25] Indeed, were conclusions to be drawn from subsequent legislative action it could easily be inferred that Congress enacted new judicial deportation provisions in 1994 and 1996 in response to the erroneous conclusions of several courts of appeals that Section 3583(d) does not authorize district courts to order the deportation of criminal aliens as a condition of supervised release. *Cf. Quaye*, 57 F.3d at 450 ("the retroactive legislative history can be read the other way just as easily"). Moreover, the fact that subsequent Congresses, of different political composition, added additional deportation procedures sheds no light on the proper interpretation of the original provision.

[26] Petitioner erroneously invokes the canon that ambiguous statutes are to be construed in favor of the alien. Pet. Br. 10; *see also* AILA Br. 11. As with the analogous rule of lenity, the Court need not indulge in presumptions where, as here, the language of the statute is plain. *Cf. Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990).



according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## APPENDIX

### 1. [18 U.S.C.] § 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

* * * *

(d) Condition of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate ex-

perts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth



in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

* * * *

**2. [8 U.S.C.] § 1251 [1988 ed. Supp. V]. Deportable aliens**

(a) Classes of deportable aliens

* * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years after the date of entry, and

(II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) Waiver authorized

Clauses (i), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

* * * *